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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

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PP Docket No. 93-253

To: The Commission

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COMMENTS AND PARTIAL OPPOSITION OF

MINNESOTA EQUAL ACCESS NETWORK SERVICES, INC.

AND SOUTH DAKOTA NETWORK, INC.

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SUMMARY

Minnesota Equal Access Network Services, Inc. ("MEANS") and South Dakota Network, Inc. ("SDN") submit these comments in support of, and in partial opposition to, petitions for reconsideration of the Commission's Fifth Report and Order, FCC 94-178, released July 15, 1994 [hereinafter Fifth Report].

MEANS and SDN are corporations formed of rural, primarily small, telephone companies which provide centralized equal access and other sophisticated Information Age services to rural parts of Minnesota and South Dakota. This Commission, several state regulatory commissions and public policy commentators have all found that the construction and operation of these centralized equal access networks is decidedly in the public interest.

MEANS, SDN and their member rural telephone companies desire to participate in the FCC's forthcoming broadband PCS auctions; as a matter of economic reality, they must be able to qualify for bidding in the entrepreneurs' blocks if these companies are to provide PCS service to the sparsely populated rural areas which they serve.

MEANS and SDN are both concerned, despite the fact that both companies are consortia whose membership are overwhelmingly "small businesses" as defined in the Fifth Report, that the attribution and affiliation rules may be read in a way to disqualify MEANS and SDN, or new consortia formed of their members, from participating in the entrepreneurs' blocks auction. Thus, these rules may penalize these rural telephone companies

who have come together for purposes which are unquestionably in the public interest. MEANS and SDN therefore request the Commission to exempt centralized equal access providers from the entrepreneurs' blocks eligibility/attribution rules or affiliation rules, or clarify that the affiliation rules would not prohibit their member rural telephone companies from forming small business consortia.

MEANS and SDN therefore support the attribution and affiliation rule changes proposed by Omnipoint Communications, Inc., BET Holdings, Inc. and Telephone Electronics Corporation, and oppose the Associated of Independent Designated Entities' opposition to small business consortia.

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COMMENTS AND PARTIAL OPPOSITION OF
MINNESOTA EQUAL ACCESS NETWORK SERVICES, INC.
AND SOUTH DAKOTA NETWORK, INC.

Minnesota Equal Access Network Services, Inc. ("MEANS") and South Dakota Network, Inc. ("SDN"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429 (1993), submit these comments in support of, and in partial opposition to, petitions for reconsideration of the Commission's Fifth Report and Order, FCC 94-178, released July 15, 1994 [hereinafter Fifth Report].

MEANS, SDN and their member rural telephone companies desire to participate in the FCC's forthcoming broadband PCS auctions; as a matter of economic reality, they must be able to qualify for bidding in the entrepreneurs' blocks if these companies are to provide PCS service to the sparsely populated rural areas which they serve. They are uniquely situated to provide PCS in their areas by virtue of their existing all-fiber and digital switch-based centralized equal access backbone networks.

MEANS and SDN are both concerned, despite the fact that the membership of both companies are overwhelmingly "small businesses" as defined in the Fifth Report, that the attribution

and affiliation rules may be read in a way to disqualify MEANS and SDN from becoming applicants in the entrepreneurs' blocks. Moreover, MEANS and SDN are fearful that even if their members form new applicants to pursue PCS, these same attribution and affiliation rules may result in disqualification of the new PCS applicants. These companies submit that such a result is at odds with Congress' intent to enfranchise rural America with PCS technology, and is patently unfair. This Commission, several state regulatory commissions and public policy commentators, such as the Aspen Report, have all found that the construction and operation of centralized equal access networks, with their attendant benefits of bringing competition and advanced Information Age services to rural America, is decidedly in the public interest. Indeed, these networks have succeeded in delivering these sophisticated services (such as Signalling System 7-based services) to their rural constituency, and, as discussed, are uniquely positioned to deploy PCS services in an efficient manner.

However, as Omnipoint Communications, Inc. (Omnipoint), BET Holdings, Inc. (BHI), and Telephone Electronics Corporation (TEC) point out, the affiliation/attribution rules are problematic, especially for existing businesses not expressly formed for the purpose of pursuing PCS licenses. MEANS and SDN thus support certain portions of their reconsideration petitions. MEANS and SDN also partly oppose the petition for reconsideration filed by the Association of Independent Designated Entities (AIDE) which

appears to oppose small business consortia. MEANS and SDN further request clarification and/or changes that must be made in order to avoid penalizing rural telephone companies who have come together for purposes which are unquestionably in the public interest. Absent such changes and/or clarification, these companies may have been better off, vis-à-vis the Commission's affiliation/attribution rules, in never having deployed centralized equal access in the first instance -- certainly an unintended result by any stretch of imagination.

In support of these comments, the following is shown:

I. INTEREST AND FACTUAL DESCRIPTION OF MEANS AND SDN

MEANS and SDN are corporations formed as consortia of rural, primarily small, telephone companies which provide centralized equal access and other sophisticated Information Age services to rural parts of Minnesota and South Dakota.

MEANS operates a centralized equal access network which serves independent telephone companies and their rural customers throughout rural Minnesota. MEANS has been granted authority to provide this service both by this Commission and by the Minnesota Public Utilities Commission. The MEANS centralized equal access network serves 266 rural telephone exchanges, having approximately 205,000 access lines. This network includes fiber optic cable linking a digital tandem switch located in Plymouth, Minnesota, a suburb of Minneapolis, with nine Toll Transfer Points located near all of U S WEST Communications, Inc.'s

existing Minnesota access tandems. The MEANS system permits interconnection with interstate and intrastate interexchange carriers at the Plymouth tandem switch and/or at the nine Toll Transfer Points. The MEANS network also provides a platform for the provision of other services such as those supported by SS7. Furthermore, the MEANS network is used to provide two-way interactive video services, including distance learning.

MEANS is comprised of 57 member telephone companies. They have widely dispersed stock ownership. The most stock held by one member is approximately seven percent of the voting stock. The next highest stock holding is approximately six percent of the voting stock. No other shareholder owns more than five percent of MEANS' stock, and their interests range from less than one percent to slightly less than five percent.

SDN also operates a centralized equal access network. Like MEANS, SDN has also been granted authority to provide this service both by this Commission and the Public Utilities Commission of South Dakota. SDN serves 113 rural telephone exchanges (approximately 52,014 access lines) in both eastern and western South Dakota. SDN's centralized equal access network includes a fiber optic backbone connecting a digital tandem switch located in Sioux Falls, South Dakota. The network links the 113 participating rural exchanges with the digital tandem switch in Sioux Falls. Interexchange carriers receive and deliver calls at that point. Like MEANS, the SDN network already serves as the platform for the provision of other services in

addition to equal access, such as SS7-supported services. Interactive video services, such as distance learning, are planned.

SDN is comprised of 17 member telephone companies. SDN's stock ownership is widely dispersed, just as MEANS' is. SDN's largest shareholder owns approximately 16% of the voting stock. The next largest stock holding is approximately 14% of the voting stock. The other 15 member telephone companies own stock that ranges from just under ten percent to less than one percent.

II. THE COMMISSION SHOULD PERMIT CENTRALIZED EQUAL ACCESS PROVIDERS TO PARTICIPATE IN THE ENTREPRENEURS' BLOCKS AUCTIONS

As previously discussed, MEANS and SDN are consortia whose membership is overwhelmingly "small business" in nature. As defined by the Commission, a "small business" is, in general, an entity that together with its affiliates has gross revenues that are not more than \$40 million and which has no attributable investor or affiliate that has a personal net worth of \$40 million or more. 47 C.F.R. § 24.720(b)(1). Almost all of MEANS' and SDN's member telephone companies satisfy the small business criteria.

MEANS and SDN may have a literal handful of members who may not qualify as "small businesses" or who may be precluded from certain BTAs by virtue of rural cellular holdings. This circumstance presents at least two problems. First, the members of the group may reform into an applicant who satisfies the small

business and cellular cross-ownership rules, by excluding those members who do not meet the rule requirements. Notably this would destroy the integrity of a group which this Commission has previously found to be in the public interest. However, in doing so, MEANS and SDN nonetheless may be considered affiliates themselves of the new PCS applicant,¹ in which case the gross revenues and total assets of the individual members of MEANS and SDN, plus the assets and revenues of MEANS and SDN themselves, may be attributed to the small business PCS applicant, see 47 C.F.R. §§ 24.709, 24.720. In that event, it is possible that neither applicant would qualify.

The second problem entailed by such a break-up of the existing consortia is that it may deny to the public the very benefits for which these networks were formed -- the ability of the networks themselves to bring their considerable expertise and efficiencies to bear in the deployment of advanced services. For instance, even if the networks were not members per se of a new consortium, and even if the overlap of ownership did not present an affiliation issue, the consortia may be precluded from using

¹ MEANS' and SDN's status as affiliates of their member rural telephone companies arguably could result from application of three of the Commission's affiliation rules: (a) common facilities, 47 C.F.R. § 24.720(1)(8); (b) stock ownership, 47 C.F.R. § 24.720(1)(4); and (c) identity of interest, 47 C.F.R. § 24.720(1)(3).

MEANS' and SDN's networks and management resources to get PCS service deployed.²

This is a classic "Catch 22" situation that penalizes rural telephone companies for having come together, for good purposes, in the first instance. The Commission thus should either expressly exempt existing centralized equal access providers from the attribution rules altogether,³ or it should clarify that their PCS small business consortia may pursue entrepreneurs' band licenses without affiliation problems associated with the fact that the networks exist. The Commission should further rule that the networks themselves may be utilized by PCS licensees, consisting of their members, in order to deploy PCS into the BTAs for which licenses are won. Should the Commission decide that

² The Commission's "affiliation through common facilities" rule, 47 C.F.R. § 24.720(1)(8), states that affiliation arises where one concern shares facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern. Thus, the "affiliation through common facilities" rule could be interpreted to prohibit the consortia from using MEANS' and SDN's networks.

³ Such an exemption could be adopted as a new subsection to Section 24.709 of the Commission's Rules, 47 C.F.R. § 24.709, as follows:

Proposed Section 24.709(f): Notwithstanding the provisions of Section 24.709(a)-(e), FCC-approved centralized equal access providers (having authority under 47 U.S.C. § 214), with their member local exchange carriers, are eligible for licenses for frequency Block C and frequency Block F.

This exemption would be consistent with TEC's request that the Commission should not attribute and aggregate the gross revenues, assets and net worth of rural telephone companies and their affiliates. TEC Petition for Reconsideration at 14.

the rules do not lend themselves to such clarification, the Commission should exempt existing centralized equal access providers from being considered affiliates of their member telephone companies, so that the member telephone companies would not be prohibited from forming small business consortia.⁴

MEANS and SDN submit that such an exception and/or clarification of the rules is clearly appropriate. The networks are clearly in the public interest,⁵ they are uniquely positioned to deploy PCS in an efficient manner, and the Commission has

⁴ Such an exemption could be adopted as a new subsection to Section 24.720(1) of the Commission's Rules, 47 C.F.R. § 24.720(1), as follows:

Proposed Section 24.720(1)(11): Notwithstanding the provisions of Sections 24.720(1)(1)-(10), an FCC-approved centralized equal access provider (having authority under 47 U.S.C. § 214) is not an affiliate of any of its member telephone companies.

⁵ Memorandum Opinion, Order and Certificate (MIEAC), File No. W-P-C-6400, released Aug. 22, 1990 (recognizing public interest benefit of making high quality services available to rural areas); Memorandum, Opinion, Order and Certificate (SDCEA, Inc.), 5 FCC Rcd. 6978, 6981 (Dom. Fac. Div. 1990) (South Dakota Network); Memorandum Opinion, Order and Certificate (Iowa Network Access Division), 3 FCC Rcd. 1468, 1468 (Com. Car. Bur. 1988) (Commission priority to speed the availability of high quality, varied competitive services to small towns and rural areas), recon. denied, 4 FCC Rcd. 2201 (Com. Car. Bur. 1989); Memorandum Opinion, Order and Certificate (Indiana Switch Access Division), File No. W-P-C-5671, Mimeo No. 3652, released Apr. 10, 1986 (implementing equal access to subscribers who otherwise might be denied the benefits of IXC competition), review denied, 1 FCC Rcd. 634 (1986); Memorandum Opinion, Order and Certificate (Contel of Indiana), 3 FCC Rcd. 4298, 4301 (Com. Car. Bur. 1988) (equal access to be brought about sooner and less expensively, aggregation of access lines will be more attractive to competitive IXCs, and plan will reduce costs to IXCs).

recognized their unique circumstances in other contexts.⁶ Also, such action would benefit a narrowly defined handful of FCC-approved centralized equal access networks which were not formed to "game" the PCS rules.⁷ Furthermore, such action would be consistent with the Commission's encouragement of rural telephone companies' use of their existing wireline network infrastructure to provide PCS,⁸ and for small businesses to pool their resources.⁹

Such action would also be consistent with the petitions filed by Omnipoint and BHI. First, Omnipoint proposes that only the attributable investors in an applicant should have to meet the entrepreneurs' blocks assets and revenue standards on an

⁶ Order (NECA: Petition for Waiver of Equal Access Balloting Requirements), 6 FCC Rcd. 4789 (Com. Car. Bur. 1991) (MEANS); Order (NECA: Petition for Waiver of Equal Access Balloting Requirements), 7 FCC Rcd. 2364 (Com. Car. Bur. 1992) (SDN); Order (NECA: Petition for Waiver of Equal Access Balloting Requirements), 4 FCC Rcd. 3949 (Com. Car. Bur. 1989) (Iowa Network Services); Report and Order and Further Notice of Proposed Rulemaking (Transport Rate Structure and Pricing), 7 FCC Rcd. 7006, 7049 (1992), modified, 8 FCC Rcd. 5370, 5387 (1993) (providing an exemption for centralized equal access providers from the requirement to provide direct-trunked transport service).

⁷ See Fifth Report, para. 180 (rebutting contentions that consortia would be used to circumvent usual eligibility requirements).

⁸ The Commission revised the rural telephone company definition to encourage rural telephone companies "who are thus likely to be able to use . . . their existing wireline telephone networks to build broadband PCS infrastructures to serve rural America." Id. para. 198.

⁹ The Commission and the SBA Chief Counsel for Advocacy have condoned the formation of small business consortia so that small businesses may pool their resources. Id. para. 179; SBA Chief Counsel for Advocacy Comments, Nov. 10, 1993, at 11-12.

individual basis, and that the assets and revenues of the investors should not be aggregated.¹⁰ Omnipoint also requests that corporations formed of small businesses not be treated differently from small business consortia.¹¹ By exempting centralized equal access providers from the attribution rules, the Commission would be giving MEANS and SDN (i.e., corporations formed primarily of small businesses) the same exemption from the aggregation rules that it already has provided for small business consortia,¹² and would be consistent with Omnipoint's proposals.

Second, BHI argues that the Commission's attribution rules should be interpreted flexibly since they unfairly limit the ability of existing corporations who were not formed expressly for the purpose of pursuing PCS licenses.¹³ This is exactly the problem confronting MEANS and SDN. Thus, MEANS and SDN agree with BHI that the Commission should modify its rules so that existing entities may participate in the auctions.

Finally, MEANS and SDN agree with BHI that the Commission did not adopt the affiliation rules pursuant to proper notice and

¹⁰ Omnipoint Petition for Reconsideration at 6. Omnipoint also suggests, in the alternative, that a multiplier be used when aggregating revenues. Id. at 7. Should the Commission decide not to eliminate aggregation, MEANS and SDN would support a multiplier approach, and further suggest that it be applied to aggregating assets as well as revenues.

¹¹ Id. at 9.

¹² See 47 C.F.R. § 24.709(a)(3).

¹³ BHI Petition for Reconsideration at 12-15.

comment procedures.¹⁴ In the Notice of Proposed Rulemaking, 8 FCC Rcd. 7635, 7647 n.51 (1993), the Commission did not give notice that affiliation would be considered in determining an entity's compliance with the net worth/income standard for small businesses. Also, the Commission gave no notice that it was considering adopting the common facilities, stock ownership and identity of interest affiliation rules in the Second Report and Order, para. 272, and gave no explanation for those rules when it adopted them, see Fifth Report, paras. 204, 206. Thus, MEANS and SDN submit that these affiliation rules are unlawful, and agree with BHI's request that the Commission refrain from applying the affiliation rules.¹⁵

CONCLUSION

For the foregoing reasons, MEANS and SDN request the Commission to exempt centralized equal access providers from the entrepreneurs' blocks eligibility/attribution rules or affiliation rules, or clarify that the affiliation rules would not prohibit their member rural telephone companies from forming small business consortia. Thus, MEANS and SDN support the attribution and affiliation rule changes proposed by Omnipoint,

¹⁴ Id. at 21.

¹⁵ BHI Petition for Reconsideration at 22.

BHI and TEC, and oppose AIDE's opposition to small business consortia.

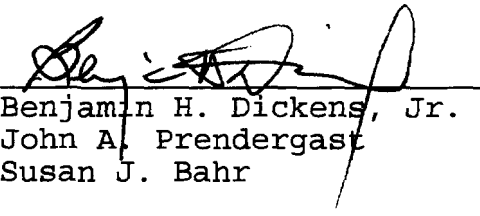
Respectfully submitted,

**MINNESOTA EQUAL ACCESS NETWORK
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and

SOUTH DAKOTA NETWORK, INC.

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Dated: September 9, 1994

CERTIFICATE OF SERVICE

I, Christs L. Sanden, hereby certify that I am an employee of Blooston, Mordkofsky, Jackson & Dickens, and that on this 9th day of September, 1994, I caused mailed postage-prepaid, by U.S. first class mail, a copy of the foregoing **"Comments and Partial Opposition of Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc."** to the following:

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